No. 89-1048

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FMC CORPORATION,

Petitioner,

v.

CYNTHIA ANN HOLLIDAY,

Respondent.

PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari on an ERISA preemption claim where the ERISA plan already took advantage of certain provisions of the state law and only seeks preemption of certain other portions?

2. Should this Court grant certiorari and review a Pennsylvania motor vehicle insurance statute where there is no conflict among the Courts of Appeals on the issue of ERISA preemption as to such statutes and where this Court has previously declined to review the same result?

3. Should this Court review the Third Circuit decision concerning the meaning of ERISA's deemer clause when the Pennsylvania statute does not relate to ERISA plans to such an extent as to come within ERISA's initial preemption clause?

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STATEMENT OF THE INTEREST OF AMICUS CURIAE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Pennsylvania Trial Lawyers Association files this Brief as Amicus Curiae supporting the position of Respondent Cynthia Ann Holliday. Signed consents permitting the filing of this Brief, from Counsel for Petitioner FMC Corporation and from Attorney Thomas G. Johnson representing Respondent Cynthia Ann Holliday, have been filed with the Clerk of this Honorable Court. The Pennsylvania Trial Lawyers Association is a private non-profit association with a membership of nearly 4,500 trial attorneys in the Commonwealth of Pennsylvania, predominately representing

injured parties in their attempt to seek redress for their injuries in the Courts. The issue of subrogation in Pennsylvania automobile cases has a significant impact on the interests of injured parties and on the practive of law in Pennsylvania. Any determination, therefore, by this Honorable Court of the issues in the case at bar will directly affect the members of the Pennsylvania Trial Lawyers Association and the interests of their clients.

This Brief is filed timely pursuant to the schedule established by the Rules of this Honorable Court for the filing of Briefs in Opposition to a Petition for a Writ of Certiorari.

STATUTES INVOLVED

In addition to the statutes identified by Petitioner, this case involves Section 1719 of the Pennsylvania Motor Vehicle Financial Responsibility Law of 1984 (the "Financial Responsiblity Law") which provides:

> (a) General rule. - Except for workers' compensation, a policy of insurance issued or delivered pursuant to this subchapter shall be primary. Any program, group contract or other arrangement for payment of benefits such as described in section 1711 (relating to required benefits) 1712(1) and (2) (relating to availability of benefits) or 1715 (relating to availability of adequate limits) shall be construed to contain a provision that all benefits provided therein shall be in excess of and not in duplication of any valid and collectible first party benefits provided in section

1711, 1712 or 1715 or workers' compensation.

75 Pa. Cons. Stat. Ann. §1719(a) (Purdon 1984).

SUMMARY OF REASONS

The Petitioner seeks to have this Court determine that Section 514(a) of the Employee Retirement Income Security Act of 1974 preempts the Pennsylvania Motor Vehicle Financial Responsibility Law of 1984. If the state law were preempted, it would be preempted for all purposes. Both the District Court and the Court of Appeals, however, found that the Petitioner herein availed itself of the benefits of the Financial Responsibility Law to reduce the amount that it would have been required to pay on behalf of the Respondent. The decisions of this Court do not allow an ERISA plan to pick and choose those parts of a state law which benefit the

plan but "preempt" those parts that the plan does not find desirable. Consequently, certiorari should not be granted herein where Petitioner has already taken advantage of the law it now seeks to have preempted.

The Petitioner incorrectly argues that the Court of Appeals for the Third Circuit did not follow this Honorable Court's decision in Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed. 2d 728 (1985).

The decision of the Court of Appeals in this matter specifically cited Metropolitan Life and the Court of Appeals for the Third Circuit has applied the dictates of Metropolitan Life in prior decisions. See Insurance Board of Bethlehem Steel Corp. v.

Muir, 819 F.2d 408 (1987). The Court of Appeals simply held that Metropolitan Life was not controlling in this case.

There is not a substantial and direct conflict among the Courts of Appeals on this issue. The decisions cited by Petitioner to support its argument of conflict involve different issues than the question of preemption of a state automobile no-fault insurance statute. It is noteworthy that this alleged "conflict" has existed for quite some time and that this Honorable Court has on at least three prior occasions refused writs for certiorari in the same cases used by

Petitioner to support its present argument about this "conflict".1 The Petitioner presents no reasons as to why this Court should now grants its petition having thrice refused this issue.

This case does not have national significance such as would justify consuming the judicial resources of this Honorable Court. In addition, this amicus curiae

1. Powell v. Chesapeake and Potomac Telephone Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); Reilly v. Blue Cross and Blue Shield United of Wisconsin, 846 F.2d 416 (7th Cir. 1988), cert. denied, 104 S.Ct. 145 (1988); Northern Group Services, Inc. v. Auto Owners Insurance Co., 833 F.2d 85 (6th Cir. 1987), cert. denied, 108 S.Ct. 1754 (1988).

presents an alternative argument that the statute herein does not "relate to" ERISA such that it should be preempted.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITIONER HAVING AVAILED ITSELF OF THE BENEFITS OF THE PENNSYLVANIA MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW CANNOT NOW ARGUE THAT THE LAW IS PREEMPTED.

It is uncontested that the FMC Corporation took advantage of those provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law that were helpful to it. At a minimum, this included having the applicable automobile insurance carrier pay its full Ten Thousand ($10,000.00) Dollars of medical benefits coverage before FMC paid any benefits on behalf of the Respondent. (Petition for Writ of Certiorari at page A4.) The plan of the FMC Corporation specifically incorporated into its terms "no-fault"

automobile insurance plans such as the Pennsylvania law in question. (See Petition at page A3.) Having now availed itself of those provisions of the Financial Responsibility Law which it considered beneficial to itself, the Petitioner now suggests that federal law should preempt those portions of the Financial Responsibility Law which it does not find beneficial, in particular Section 1720. It is important to note that the FMC plan in this case was included in section 1720 of the Financial Responsibility Law by its identification in the coordination of benefits provision of section 1719.

The Petitioner misunderstands the scope of the preemption clause in Section 514(a) of

ERISA. The Petitioner cannot "pick and choose" those portions of a state law which are of benefit to it and seek to "preempt" other portions. If a law is preempted, it does not matter that portions of it would be beneficial to the Petitioner or consistent with ERISA requirements. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed. 2d 728 (1985); Mackey v. Lanier Collections Agency, 486 U.S. 825, 108 F.Ct. 2182, 2185, 100 L.Ed. 2d 836 (1988).

FMC took advantage of Section 1719 of the Financial Responsibility Law pertaining to the coordination of benefits between automobile insurance and the plan and is therefore estopped from arguing that other portions of

the law should be preempted by ERISA. No explanation has ever been offered by FMC at any time during the pendency of this matter as to why or how certain parts of the Financial Responsibility Law would be preempted but not other parts. Since FMC by its conduct has relied on and used the Financial Responsibility Law to its own advantage, it is estopped from arguing that the law is preempted by ERISA.

II. THE COURT OF APPEALS DID NOT DISREGARD, AND ITS DECISION IS NOT CONTRARY TO, THIS COURT'S DECISION IN METROPOLITAN LIFE INSURANCE CO. V. MASSACHUSETTS.

The Petitioner argues in its Petition that the Court of Appeals for the Third Circuit ignored this Court's decision in

Metropolitan Life when it analyzed the congressional intent behind the ERISA preemption, savings and deemer clauses. This is simply incorrect.

This Court has repeatedly held that it is necessary to analyze the purpose behind the preemption clause to determine the intent of Congress in order to decide if a state law is preempted by ERISA. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 103 S.Ct. 2890, 77 L.Ed. 2d 490 (1983); Metropolitan Life, 105 S.Ct. at 2389; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 - 52, 107 S.Ct. 1549, 95 L.Ed. 2d 39 (1987).

While the preemption clause of ERISA is very broad, this Court has determined that "we must also presume that Congress did not intend

to pre-empt areas of traditional state regulation." Metropolitan Life, 105 S.Ct. at 2389. Certainly state automobile insurance laws are familiar examples of an area of traditional state regulation. See Metropolitan Life, 105 S.Ct. at 2383.

Congress intended that the preemption clause of ERISA would not interfere with the ability of the states to regulate their traditional areas of responsibility.

> ERISA preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system".

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 2221, 96 L.Ed. 2d 1 (1987), citing Alessi v. Raybestos-Manhattan,

Inc., 451 U.S. 504, 522, 101 S.Ct. 1895, 1905 (1981). This is exactly the analysis which the Court of Appeals undertook in this matter. This analysis was in keeping with the clear mandate of the decisions of this Court.

The decision by the Court of Appeals is in accord with the reasoning of Metropolitan Life.

III. THERE IS NO SUBSTANTIAL AND DIRECT CONFLICT AMONG THE COURTS OF APPEALS THAT A DECISION IN THIS CASE WILL RESOLVE.

The Petitioner argues that the Court of Appeals for the Third and Sixth Circuits are in conflict on this preemption issue with the Courts of the Fourth, Fifth, Seventh, Eighth and Ninth Circuits which Petitioner states "have followed Metropolitan Life". There is

no such conflict.

As noted above, the Court of Appeals in the case at bar did follow the required analysis set forth by this Court in Metropolitan Life. The particular issue in Metropolitan Life involved whether a state law could mandate that a self-funded ERISA plan must provide certain benefits. Both the Third and the Sixth Circuits have held in accord with this Court's decision in Metropolitan Life that such state laws are preempted by ERISA. Insurance Board of Bethlehem Steel Corporation v. Muir, 819 F. 2d 408 (3d Cir. 1987); Liberty Mutual Insurance Group v. Iron Workers Health Fund of Eastern Michigan, 879 F.2d 1384 (6th Cir. 1989). In cases involving state laws mandating the

provision of certain benefits, there is an easily applied "bright-line" test of whether the ERISA plan is self-funded as opposed to fully insured. Such a simplistic test does not work in analyzing the preemption issue as it involves a state motor vehicle "no-fault" statute which clearly encompasses an area of traditional state regulation. The analysis provided by the Court of Appeals for the Third Circuit in this case was totally in line with the dictates of this Court.

The decisions cited by the Petitioner from the other Courts of Appeals are not in direct conflict with the decision at bar. Both Children's Hospital v. Whitcomb, 778 F.2d 239, (5th Cir. 1985) and Reilly v. Blue Cross and Blue Shield United of Wisconsin, 846 F.2d

416 (7th Cir. 1988), cert. denied, 104 S.Ct. 145 (1988), dealt with state requirements that a plan provide certain benefits or state law remedies to force a plan to provide certain benefits. These decisions are directly determined by Metropolitan Life. Both Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989) and United Food & Commercial Workers v. Pacyga, 801 F.2d 1157 (9th Cir. 1986) dealt with state common law prohibitions against subrogation. Neither involved a comprehensive state motor vehicle insurance statute where the analysis used by the Court of Appeals herein was necessary given the traditional state interest in automobile insurance. In Powell v. Chesapeake & Potomac Telephone Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), cert.

denied, 476 U.S. 1170 (1986), the issue was the application of the state insurance trade practices law to the plan, which would have required that the state "deem" the plan to be an insurance company.

Only Northern Group Services, Inc. v. Auto Owners Insurance Co., 833 F.2d 85 (6th Cir. 1987), cert. denied, 108 S.Ct. 1754 (1988), involved the same issue as the case at bar. Petitioner concedes that both Courts of Appeals applied the same reasoning and reached the same conclusion. This Court refused to review the Northern Group Services decision.

It is noteworthy that even if one were to use the broad generalizations that Petitioner uses in attempting to argue that there is a conflict, the cases cited by Petitioner

clearly establish that this Court has on at least three prior occasions refused to resolve the alleged conflict. Powell, cert. denied, 476 U.S. 1170 (1986); Reilly, cert. denied, 104 S.Ct. 145 (1988); Northern Group Services, cert. denied, 108 S. Ct. 1754 (1988).

IV. THERE IS NO FEDERAL INTEREST IN PREEMPTING THE PENNSYLVANIA MOTOR VEHICLE FINANCIAL RESPONSIBILTIY LAW.

Both the case at bar and the Northern Group Services case involved state no-fault automobile insurance laws and a state's uniform scheme of coordination of benefits. In neither case is there a discernable federal interest and the holdings are quite limited to the facts set forth in those cases.

The issue involved in this case is a preemption of the Pennsylvania Financial Responsibility Law and not just the section that the Petitioner does not find beneficial to its interests. If the Financial Responsibility Law were preempted by ERISA, the Petitioner is under the incorrect assumption that its plan would then become the law of Pennsylvania for all of its beneficiaries. It is particularly noteworthy that the subrogation clause of the FMC Salary Health Plan as spelled out at page A4 of the Petition for Writ of Certiorari specifically provides that a beneficiary under the plan bringing a liability claim against any third party must claim benefits paid pursuant to the FMC plan and must reimburse the plan for

all benefits provided. The enforcement of such plan provisions would fly directly in the face of the Pennsylvania "no-fault" motor vehicle insurance system and could change the rules of state pleading and procedure in third-party tort liability cases where a plan beneficiary was involved. No-fault motor vehicle insurance laws traditionally restrict the ability of injured parties to collect certain benefits in third party tort suits.

The provisions of the FMC plan would not be substituted for the Financial Responsibility Law but rather this Court or another federal court would have to establish Federal "common law" as to automobile liability claims and coordination of benefits provisions. It certainly was never the

intention of Congress that the federal courts would adopt a national uniform system of automobile insurance claims and procedure pursuant to ERISA. Yet this is what would occur if the simplistic test advocated by the Petitioner were to be adopted by this Court. The decision of the Court of Appeals applying the analysis mandated by this Court was the correct decision in this case. The Petition for Certiorari should be denied by this Honorable Court.

V. THE PENNSYLVANIA FINANCIAL RESPONSIBILITY LAW DOES NOT "RELATE TO" THIS PLAN SUCH THAT IT WOULD BE PREEMPTED BY ERISA.

Although the Court of Appeals for the Third Circuit decided that the Financial Responsibility Law does "relate to" employee

benefit plans, 29 U.S.C. §1144(a), this amicus curiae argued in that Court that the Financial Responsibilty Law does not come within the scope of the ERISA preemption in the first place.

It is firmly established that not all state laws with an impact on ERISA plans are preempted. This Court determined in Mackey v. Lanier Collections Agency that ERISA did not supersede the Georgia garnishment law and as part of its discussion listed numerous state laws which "although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA §514(a)." 108 S.Ct. 2187. In Shaw v. Delta Airlines, Inc., 463 U.S. 85, 87, 103 S.Ct. 2890, 2901, 77 L. Ed. 2d 490 (1983), this Court held that "some

state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant the finding that the law 'relates to' the plan".

The Pennsylvania Financial Responsibility Law is not aimed at ERISA plans nor does it deal with the subjects regulated by ERISA. The Pennsylvania Law is concerned with no-fault automobile insurance, not employee benefit plans. It does not require employee benefit plans to provide coverage for automobile accidents or even to provide any health benefits coverage at all. The Financial Responsibility Law does not materially "relate to" or "proport to regulate" ERISA plans and therefore is not

preempted.

CONCLUSION

The analysis by the Court of Appeals was sound and as directed by this Court's prior decisions. The Petition for Writ of Certiorari should be denied by this Honorable Court.

Respectfully Submitted,

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